

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

Hezekiah Esau Baker,  
  
Plaintiff  
  
v.  
  
WestStar Credit Union,  
  
Defendant.

Case No. 2:21-cv-02128-CDS-BNW

Order Granting Defendant's Motion to  
Compel Arbitration, Denying as Moot  
Defendant's Motion to Strike, Denying as  
Moot Plaintiff's Motion for Leave to File An  
Opposition, and Dismissing the Case  
Without Prejudice

(ECF Nos. 21; 39; 40)

Pending before the Court is Defendant WestStar Credit Union's Motion to Compel Arbitration and Stay the Proceedings which was filed on May 17, 2022. ECF No. 21. In sum, the motion contends that arbitration is consistent with the provisions of an agreement Plaintiff Hezekiah Baker entered when he became a member of WestStar in June of 2013. Baker, proceeding *pro se*<sup>1</sup>, filed what this Court liberally construes as an opposition to the motion on May 23, 2022, essentially arguing that the motion should be denied because he never had the opportunity to review or sign the agreement, and his signature was incorporated onto documents electronically. *See generally* ECF No. 22. Weststar's reply was filed on June 6, 2022. ECF No. 25. After careful consideration of the moving papers, the relevant law, and the record in this case, the Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; LR 78-1. For the reasons set forth below, I grant the motion to compel arbitration

<sup>1</sup> Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Plaintiff's pleading is titled "Notice...for a[n] Order Compelling Production of Documents Regarding Plaintiff's Interrogatories in Opposition to Defendants Answer to Complaint to Compel Arbitration and Stay of All Proceeding." ECF No. 22. Currently, this Court only addresses arguments related to the pending motion to compel arbitration.

1 and dismiss this case without prejudice. Further, because I am dismissing this action without  
2 prejudice, I do not address WestStar's Motion to Strike (ECF No. 39) or Plaintiff's Motion for  
3 Leave to File An Opposition (ECF No. 40). Rather, those motions are both denied as moot.

4 **I. Relevant Background Information**

5 Plaintiff Hezekiah Esau Baker initiated this action on November 30, 2021, alleging that  
6 WestStar Credit Union and its employees violated 42 U.S.C. § 407 by transferring Social  
7 Security benefits from his savings account into his checking account to pay a debt.<sup>2</sup> ECF Nos. 2,  
8 4. On March 31, 2022, the Amended Complaint, ECF No. 4, was screened by United States  
9 Magistrate Judge Brenda N. Weksler. ECF No. 6. She found that given "the liberal construction  
10 courts are to afford *pro se* complaints, it appears Plaintiff states a claim against WSCU at least  
11 for purposes of surviving screening" and ordered that the case would proceed against WestStar.  
12 *Id.* WestStar then filed the instant motion. ECF No. 21.

13 In support of their assertion that Baker agreed to arbitrate all claims regarding his  
14 account, WestStar submitted the affidavit of Donna Rumph, a copy of the signature card Baker  
15 executed when he opened his account with the credit union, all subsequent signature cards  
16 executed by Baker, a copy of the Important Account Information for Our Members, a Change of  
17 Address Form executed by Baker, and a copy of the Notice of Change to the Terms and  
18 Conditions of Your Account, which included a redacted copy of Baker's June 2020 bank  
19 statement. Rumph stated in her affidavit that the signature card Baker executed when he  
20 opened his account included the "agreement to the terms and conditions outlined in the  
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22 <sup>2</sup> This is not the first time Baker has sued WestStar over this transfer of funds from his savings  
23 account. *See* 2:21-cv-01332-GMN-NJK. Therein, Baker filed a Notice of Voluntary Dismissal on September  
24 15, 2021, *id.* at ECF No. 14, subsequently filed two Motions to Reopen the case, *id.* at ECF Nos. 15; 18, then  
filed a second Notice of Voluntary Dismissal, *id.* at ECF No. 19. Plaintiff continues to file amended  
complaints and motions despite the fact the case is closed. *See generally id.*

1 Important Account Information for Our Members.” ECF No. 21-1 at 2. The Important Account  
2 Information for Our Members provided:

3       ARBITRATION AND WAIVER OF CLASS ACTION

4       You and the credit union agree that we shall attempt to informally settle any  
5       and all disputes arising out of, affecting, or relating to your accounts, or the  
6       products or services the credit union has provided, will provide or has offered  
7       to provide to you, and/or any aspect of your relationship with the credit union  
8       (hereafter referred to as the "Claims"). If that cannot be done, then you agree  
9       that any and all Claims that are threatened, made, filed or initiated after the  
10      Effective Date (defined below) as this Arbitration and Waiver of Class Action  
11      provision ("Arbitration Agreement"), even if the Claims arise out of, affect or  
12      relate to conduct that occurred prior to the Effective Date, shall, at the election  
13      of either you or us, be resolved by binding arbitration . . . Either you or we may  
14      elect to resolve a particular Claim through arbitration, even if one of us has  
15      already initiated litigation in court related to a Claim, by: (a) making written  
16      demand for arbitration upon the other party, (b) initiating arbitration against  
17      the other party, or (c) filing a motion to compel arbitration in court.

18       ECF No. 21-3 at 10.

19       The affidavit continues to say that the Important Account Information for Our Members  
20      included a section that stated “[w]ritten notice we give you is effective when it is deposited in  
21      the United States Mail with proper postage and addressed to your mailing address we have on  
22      file.” ECF No. 21-1 at 2. It adds that the “Notice of Change to the Terms and Conditions of Your  
23      Account was provided,” and “[t]hat document included a mandatory arbitration provision and  
24      the ability to opt out of arbitration.” *Id.* WestStar argues that by not exercising his right to opt-  
out, the agreement necessitates the action be moved into arbitration. ECF No. 21 at 4.

25       Baker opposed WestStar’s motion on several grounds, first asserting that his signature  
26      was collected on an electronic device and because the signature was collected electronically, it  
27      was incorporated by fraud. ECF No. 22 at 3, 8-9, 12-13. Baker contends that he did not explicitly  
28      sign a document setting forth an arbitration clause because he only electronically input his  
signature to obtain a debit card. ECF No. 22 at 8-9.

1 Baker does not assert that he did not sign the signature card when he initially opened his  
 2 account and received the debit card. He asserts that he never agreed to arbitrate his claims  
 3 because he never received or signed an arbitration agreement. ECF No. 22 at 8. However, Baker's  
 4 statement that he was not provided the arbitration provision is contradicted by the signature  
 5 card itself, which expressly states that he did in fact elect to receive an electronic version of the  
 6 Important Account Information for Our Members:

7 I choose to receive the Important Account Information for Our Members  
 8 disclosure and Electronic Fund Transfer disclosure (each contains important  
 9 information regarding credit union products, services, and account holder(s) legal  
 10 rights) **Via Electronic Means**

11 ECF No. 21-2 at 2 (emphasis added).

## 12 II. Legal Standard

13 The Federal Arbitration Act ("FAA"), which governs the enforceability of arbitration  
 14 agreements in contracts, was enacted "in response to widespread judicial hostility to arbitration  
 15 agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Under the Act, "[a]  
 16 written provision in ... a contract evidencing a transaction involving commerce to settle by  
 17 arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and  
 18 enforceable, save upon such grounds as exist at law or in equity for the revocation of any  
 19 contract." 9 U.S.C. § 2. The FAA reflects "a liberal federal policy favoring arbitration." *Moses H.*  
*Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

20 "By its terms, the Act 'leaves no place for the exercise of discretion by a district court, but  
 21 instead mandates that district courts shall direct the parties to proceed to arbitration on issues  
 22 as to which an arbitration agreement has been signed.'" *Chiron Corp. v. Ortho Diagnostic Sys.*, 207  
 23 F.3d 1126, 1130 (9th Cir. 2000) (quoting *Dean v. Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).  
 24

1 In deciding whether to compel arbitration, the court may not review the merits of the  
2 dispute, rather, the court's role is "limited to determining (1) whether a valid agreement to  
3 arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue."  
4 *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If the Court finds that  
5 those questions are answered in the affirmative, the Court must compel arbitration. *Id.*; *see also*  
6 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

7 The party seeking to compel arbitration "bears the burden of proving the existence of a  
8 valid arbitration agreement by [a] preponderance of the evidence." *Bridge Fund Capital Corp. v.*  
9 *Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010) (internal quotation marks and  
10 citation omitted). In determining the validity of an arbitration agreement, the Court applies  
11 state law contract principles. 9 U.S.C. § 2. To be valid, an arbitration agreement needs to be  
12 contained in a written record, even though a signature is not required. *Tallman v. Eighth Jud. Dist.*  
13 *Ct.*, 359 P.3d 113, 119 (Nev. 2015) (noting that the arbitration contract must be in writing, but  
14 "neither the FAA nor the UAA...require that the arbitral contract be executed"); *see also*  
15 *Campanelli v. Conservas Altamira, S.A.*, 477 P.2d 870, 872 (Nev. 1970) ("Although an agreement to  
16 arbitrate future controversies must be in writing, a signature is not required." (internal citation  
17 omitted)).

18 Section 3 of the FAA provides for a stay of legal proceedings whenever the issues in a case  
19 fall within the ambit of an arbitration agreement. 9 U.S.C. § 3. Although the statutory language  
20 supports a mandatory stay, the Ninth Circuit has interpreted the FAA provision to allow a  
21 district court to dismiss the action. *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir.  
22 1988). Consequently, when a district court decides that an arbitration agreement is valid and  
23 enforceable, then it should either stay or dismiss the claims subject to arbitration. *Nagrampa v.*  
24 *MailCoups, Inc.*, 469 F.3d 1257, 1276-77 (9th Cir. 2006).

1           III.     Analysis

2           This Court finds that a valid arbitration agreement existed between the parties and that  
3 the agreement encompasses Plaintiff's claims at issue. As a threshold matter to both of those  
4 issues, however, the Court addresses its ability to decide the arbitrability of the matter.

5                     i.   *Neither Party Clearly nor Unmistakably Delegated Arbitrability to an Arbitrator*

6           "[T]he question 'who has the primary power to decide arbitrability' turns upon what the  
7 parties agreed about *that* matter." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)  
8 (emphasis in original). "Unless the parties clearly and unmistakably provide otherwise, the  
9 question of whether the parties agreed to arbitrate is to be decided by the court, not the  
10 arbitrator." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).

11          Here, the parties did not "clearly and unmistakably" delegate the issue of validity to an  
12 arbitrator. Rather, the alleged agreement contains a provision stating that "[e]ither you or we  
13 [i.e., Baker or WestStar] may elect to resolve a particular Claim through arbitration...by...filing a  
14 motion to compel arbitration in court." ECF No. 21-3 at 8. Thus, this Court shall resolve the  
15 arbitrability issues.

16                     ii.   *A Valid Arbitration Agreement Exists*

17          A valid arbitration agreement exists between the parties. WestStar alleges that the  
18 documents Baker signed when opening his credit account with WestStar included a file entitled  
19 "Important Account Information for Our Members," the terms of which included the arbitration  
20 clause at issue. Motion to Compel Arbitration, ECF No. 21 at 4; *see also* ECF No. 21-3 at 8 (exhibit  
21 containing the full language of the contract). Baker contends that he never actually signed the  
22 arbitration agreement, but rather, that he signed "a gadget, a small mechanical, or electronic  
23 device or tool" (i.e., an electronic signature capture pad) which WestStar then used to  
24

1 “incorporate [Baker’s] signature onto any document [WestStar] desired at any time.” Response  
2 to Motion to Compel, ECF No. 22 at 3.

3           A contract may incorporate documents and terms by reference. Where it is  
4 clear that a party is assenting to a contract that incorporates documents by  
5 reference, the incorporation is valid – and the terms of the incorporated document  
6 are binding – so long as the incorporation is clear and unequivocal, the reference is  
called to the attention of the other party and he consents thereto, and the terms of  
the incorporated document are known or easily available to the contracting  
parties.

7 *In re Holl*, 925 F.3d 1076, 1084 (9th Cir. 2019). The signature card signed by Baker certifies  
8 “[a]greement to the terms and conditions outlined in the Important Account Information For  
9 Our Members disclosure and any other material pertaining to the account.” ECF No. 21-2. This  
10 statement plainly refers to an external document, and plainly states that Baker agreed to be  
11 bound by the terms contained therein. Moreover, Baker’s assertion that he did not actually  
12 receive the Important Account Information For Our Members disclosure does not defeat the  
13 signature card’s statement that Baker bound himself to the terms contained therein.

14           Baker offers no evidence to support his claims that his signature was fraudulently placed  
15 on subsequent signature cards, or evidence that WestStar incorporated his signature onto an  
16 arbitration agreement. WestStar itself does not provide direct evidence that Baker signed an  
17 arbitration agreement. Instead, WestStar’s exhibit (ECF No. 21-2 at 2) shows that on June 19,  
18 2013, Baker placed his electronic signature on the signature card thereby certifying “[a]greement  
19 to the terms and conditions outlined in the Important Account Information For Our Members  
20 disclosure and any other material pertaining to the account.” By signing the signature card,  
21 Baker agreed to arbitrate every claim arising from or relating in any way to his account. *See, e.g.*,  
22 *Freitas v. Cricket Wireless, LLC*, 2022 WL 1082014, at \*9 (N.D. Cal. Apr. 11, 2022) (stating that “the  
23 electronic signature agreements are valid in all jurisdictions”).

1 I now turn to some of Baker's counterarguments, including his position that the  
2 agreement is void because "any agreement containing an arbitration clause include 'specific  
3 authorization for the provision which indicates that the person has affirmatively agreed to the  
4 provision' that an arbitration clause that fails to include such an authorization is void and  
5 unenforceable." ECF No. 22 at 11. He added that "any valid arbitration agreement must reflect  
6 the conscious, mutual and free will of the parties to resort to arbitration." *Id.*

7 It appears Baker is drawing support for his position from NRS 597.995, a Nevada  
8 provision requiring that "an agreement [that] includes a provision [that] requires a person to  
9 submit to arbitration any dispute arising between the parties to the agreement must include  
10 specific authorization for the provision [that] indicates that the person has affirmatively agreed  
11 to the provision." Nev. Rev. Stat. § 597.995(1). But NRS 597.995 is preempted by the FAA.  
12 *MMAWC, LLC v. Zion Wood Obi Wan Trust*, 448 P.3d 568, 571 (Nev. 2019) (holding that the FAA  
13 preempts NRS 597.995 because "[the specific-authorization requirement] singles out arbitration  
14 provisions as suspect and violates the FAA"). To the extent Baker argues that I should import  
15 NRS 597.995's heightened authorization requirements to the FAA, I decline to do so because  
16 that would be contrary to law.

17 Furthermore, Baker interprets this statute to require that an arbitration agreement be a  
18 standalone document. ECF No. 22 at 12. Baker's interpretation has no basis in law. The Nevada  
19 Supreme Court has ruled how an arbitration agreement may satisfy NRS 597.995. *See Fat Hat,*  
20 *LLC v. DiTerlizzi*, 2016 WL 5800335, at \*2 (Sept. 21, 2016) (unpublished). It held that an  
21 arbitration clause inside an agreement that lacked a separate line to acknowledge the arbitration  
22 clause specifically did not comply with the statute, but an agreement that required the signers  
23 "to fill in their names and addresses in the blank spaces of the provision, explicitly stating that  
24 the agreement to arbitrate was effective" did. *Id.* So the statute does not require a standalone



1 agreement, just an additional, more specific acknowledgment. Here, the acknowledgment  
2 requirement was met when Baker signed the signature card and, during that sign-up process,  
3 selected the checkbox to receive “important information regarding . . . account holder(s) legal  
4 rights” by electronic means rather than “Via Paper<sup>3</sup>.” ECF No. 21-2 at 2.

5 Even if I were to find that NRS 597.995 could apply to this case and I adopted Baker’s  
6 interpretation, the Notice of Change to the Terms and Conditions of Your Account (ECF No. 21-  
7 5 at 2), which clearly sets forth the terms and conditions of arbitration, provided to Baker with  
8 his June 2020 bank statement would satisfy the statute as a “standalone” document. With that,  
9 Baker was placed on notice he was subject to an arbitration agreement **unless** he exercised his  
10 right to opt-out of the agreement.

11 Finally, the Court finds it important to note that Baker could have opted out of the  
12 arbitration provision. Not only does WestStar’s evidence show that Baker received a paper  
13 version of the arbitration agreement (ECF No. 21-5), but it also forecloses Baker’s argument that  
14 they “did not allow [him] time to review the document and reach a decision whether to endorse  
15 it or not.” ECF No. 22 at 9. The Notice of Change to the Terms and Conditions of Your Account  
16 conspicuously warned Baker that he would be deemed to have accepted the arbitration program  
17 unless he opted out within 30 days, but it also provided directions on how to do so. ECF No. 21-  
18 5. The very existence of the opt-out option provided Baker a meaningful choice. He could have  
19 opted-out of the arbitration agreement but did not.

20 . . .

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23 <sup>3</sup> This further negates Baker’s argument that WestStar did not provide him “the opportunity to  
24 review the document ... because all the Defendant had to do was print the document, [and] present it to  
Plaintiff.” ECF No 22 at 9. The signature card presents two options (print or electronic) and Baker chose  
to receive the information electronically. ECF No. 21-2.

1                                   iii. *The Arbitration Provision Covers this Dispute*

2           The arbitration agreement unambiguously expresses that “*all disputes arising out of, affecting,*  
 3 *or relating to your accounts, or the products or services the credit union has provided,* will provide or has  
 4 offered to provide to you, and/or any aspect of your relationship with the credit union...at the  
 5 election of either you or us, be resolved by binding arbitration...” ECF Nos. 21-3 at 10-11; 21-5  
 6 (emphasis added). This lawsuit is a dispute that has arisen related to the checking and savings  
 7 accounts Baker held at WestStar. *See generally* ECF No. 4. Baker does not address this point. In  
 8 fact, Baker’s opposition is silent on whether his claims against WestStar would fall within the  
 9 scope of the arbitration agreement; he solely argues that he never actually consented to the  
 10 agreement. ECF No. 22.

11           WestStar has sufficiently demonstrated that Baker agreed to arbitrate this dispute.  
 12 Because the signature card signed by Baker expressly incorporates WestStar’s terms and  
 13 conditions, and because Baker does not dispute that he signed the signature card to open an  
 14 account or that he failed to opt-out of the modified terms and conditions of the account, the  
 15 court concludes that there exists a valid agreement to arbitrate.

16                                   iv. *This Action Should Be Dismissed*

17           Finally, having determined that the Agreement is binding, and that Baker’s claims are  
 18 arbitrable and, therefore, *must* be submitted to arbitration, the Court turns to the question of  
 19 staying or dismissing Baker’s action.

20           The FAA provides that, “upon being satisfied that the issue involved in [a] suit...is  
 21 referable to arbitration..., [a court] shall on application of one of the parties stay the trial of the  
 22 action until such arbitration has been had..., providing the applicant for the stay is not in default  
 23 in proceeding with such arbitration.” 9 U.S.C. § 3. However, “[t]he Ninth Circuit has held...that  
 24 § 3 does not impose a mandatory duty to stay on district courts. Thus, even where a party seeks a

1 stay under § 3, the court has discretion to dismiss under Rule 12(b)(6) if it finds that all of the  
2 claims before it are arbitrable.” *Luna v. Kemira Specialty, Inc.*, 575 F. Supp. 2d 1166 (C.D. Cal. 2008)  
3 (citing *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988); *Thinket Ink Info. Res., Inc. v.*  
4 *Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004)).

5 In this case the language of the arbitration agreement mandates arbitration for “any and  
6 all disputes arising out of, affecting, or relating to your accounts...” In light of the Court's  
7 conclusion that Baker must be compelled to arbitrate all the claims asserted in this action,  
8 “retaining jurisdiction and staying the action will serve no purpose.” *Alford v. Dean Witter Reynolds,*  
9 *Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (noting that when all issues are raised in an action are  
10 arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action  
11 will serve no purpose). Because there are no live controversies remaining in this action, the  
12 Court concludes that it should dismiss Baker’s claims without prejudice.

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